

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
CASE NO. 2019-CP-40-05698

First-Citizens Bank & Trust Company,  
Inc.,

Plaintiff

**ORDER**

**RECEIVED**

**Oct 21 2021**

**SC Court of Appeals**

-vs-

Justin K. Spires, Timothy J. Spires, Sr.,  
South Carolina Department of Probation,  
Parole and Pardon Services and Warren  
B. Giese as Solicitor,

Defendant(s)

This matter was before me on Friday, June 4, 2021 pursuant to the Defendants Justin K. Spires and Timothy J Spires Sr. (the “ Defendants” ) Motion for Relief from Default Judgment. Present at the hearing were Sean M. French Sr., attorney for the Defendants and Theodore von Keller, attorney for Plaintiff. After consideration of the Court filings, argument of counsel and the submissions of counsel, the Court denies the motion as set forth herein.

**A. FACTS**

Defendants Justin K. Spires and Timothy J. Spires Sr. entered into a Promissory Note dated August 31, 2006 with Plaintiff. Pursuant to the terms of the Note, Plaintiff provided financing to Defendants to enable Defendants to purchase real property located at 30 Cardington Court, Columbia, SC 29209. Defendants granted Plaintiff a security interest in the real property as reflected in the Note and Mortgage. Defendants defaulted under the terms of the Note and Plaintiff filed suit in October 2019 and obtained service on the Defendants on October 15, 2019 as reflected in the Affidavits of Service filed with the Court. Defendant’s responsive pleadings were due on or before November 15, 2019. Plaintiff filed an Affidavit of Default on November 20, 2019.

A Notice of Hearing was mailed to Defendants on January 21, 2020. An Order of Judgment of Foreclosure and Sale was signed by Master in Equity Judge Strickland and entered on February 18, 2020. Notice of Sale was published on March 20, 2020 with a sales date scheduled of April 6, 2020. The April 6, 2020 sales date was cancelled due to COVID-19.

On May 15, 2020, Plaintiff submitted its Certification of Compliance with the Coronavirus Aid, Relief and Economic Security Act, Affidavit of Default, Notice of Motion and Motion for Default Judgment and proposed Order of Default Judgment for Repossession and Writ of Assistance.

A Notice of Sale and Judgment was mailed on June 19, 2020 for the July 6, 2020 sales date. A foreclosure sale was held on July 6, 2020 and Plaintiff was the successful, high bidder. On July 9, 2020, Plaintiff became aware that Defendant Justin K. Spires filed for Bankruptcy on July 6, 2020 and Plaintiff moved to vacate the foreclosure sale.

On November 20, 2020, a new Judgment for Foreclosure and Sale was signed by Judge Strickland. A foreclosure sale was held on December 7, 2020 and Plaintiff was the successful, high bidder.

On January 25, 2021, a Notice to Vacate letter was sent to the Defendants. A Rule to Show Cause was filed on February 8, 2021 and the Rule to Show Cause was posted on February 24, 2021 due to the occupant of the home refusing to accept service.

The Order for Writ of Assistance was signed on March 19, 2021. On May 17, 2021, Defendant filed its Motion to Vacate the Sale, Motion for Relief from Default and Motion to Dismiss the action for Lack of Personal Jurisdiction.

**B. UNDER S.C.R.C.P. 4, PERFECT SERVICE IS NOT REQUIRED TO ESTABLISH PROPER SERVICE OF PROCESS.**

South Carolina has never required exacting compliance with the rules to effect service of process. *Roche v. Young Bros.*, 318 S.C. 207, 456 S.E.2d 897 (SC 1995). See *Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900)(when officer's return defective as to time and place of service, it can be amended to state facts); *Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); *Miller v. Hall*, 1 Speers 1 (1842). Rather, the Court inquires whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. *Roche*, supra.

Service of Process was obtained on October 12, 2019 by leaving a copy at the dwelling house or of the mortgaged property with some person of suitable age and discretion then residing therein. As reflected in the affidavit of service, the person served, Mitch Smith, informed the process server that he was a co-resident in the dwelling house of Defendant Justin Spires and Timothy J. Spires, Sr. The Defendants offered no evidence that they had provided Plaintiff with a writing identifying a new or different address than the mortgaged property. S.C Code of Laws Section 37-1-201((6) "when the civil rules on service are followed, there is a presumption of proper service." 62B Am Jur 2d Process § 111 (1990). As service of process was obtained in a manner compliant with S.C.R.C.P 4 service was therefore proper service under the laws of South Carolina.

**C. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER RULE 60(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.**

In determining whether to grant relief under Rule 60(b)(1) of the South Carolina Rules of Civil Procedure, the court must consider the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001).

In regards to the first prong of the test, Defendant Justin K. Spires did not move promptly for relief from judgment. The record before the Court reveals that the Defendants received no less than 11 separate notices regarding this foreclosure prior to filing for relief: 1) personal service of the Summons and Complaint ;2) Notice of Hearing dated January 21, 2020; 3) Notice of Sale published March 20, 2020; 4) Order of Judgment and Notice of Sale mailed June 16, 2020 to record address ; 5) July 3, 2020 telephone call to Plaintiff by Justin Spires; 6) July 6, 2020 filing of bankruptcy by Justin Spires on the eve of the foreclosure sale; 7) publication for the July 6, 2020 foreclosure sale ; 8) Notice of Sale and Judgment mailed for December 7, 2020; 9) publication of Notice of Sale;10) Notice to Vacate dated January 25, 2021 and 11) Rule To Show Cause posted February 24, 2021.

At oral argument, counsel for the Plaintiff also provided the Court with the Notice of Bankruptcy sent to Plaintiff's law firm by Defendant Justin Spires' bankruptcy counsel on July 6, 2020 in an effort to stop the foreclosure sale. Despite multiple notices of the foreclosure proceedings from as early as January, 2020, Defendants, however, did not move for relief until May 17, 2021. Defendants' motion did not occur until fifteen (15) months after the initial Judgment of Foreclosure and Sale and five (5) months after the Foreclosure Sale was held. Defendants have therefore failed to meet the test of promptly moving for relief despite knowledge of the foreclosure and foreclosure sale.

In regards to the second prong of the test, Defendants also cannot show an appropriate reason for the failure to act promptly. Defendants' motion asserts service was not properly obtained, however, when service is obtained in a manner compliant with S.C.R.C.P. 4, service is presumed to be proper. As set forth above, there were no less than eleven (11) documents regarding the Foreclosure action that were sent to Defendants. In additional, Plaintiff's affidavit reflects a phone call between the Bank and Defendant Justin Spires the day before the foreclosure sale in which he was informed of the pending foreclosure sale .This phone call apparently led to the filing of bankruptcy by Justin Spires in an attempt to stop the sale. All of this establishes that Defendants had personal knowledge that the action was ongoing, failed to take action and have failed to provide an appropriate reason for the failure to act promptly.

More importantly, Defendants cannot show a meritorious defense. The present case is an action for the foreclosure of property secured by a Note and Mortgage. Under the terms of the contract and South Carolina Law, Plaintiff is entitled to the foreclosure of its secured collateral upon the default of the Defendants. Neither the contract nor South Carolina Law grants Defendants the right to reinstate the contract.

In the present case, the Affidavit of the Representative of Plaintiff reflects that the Defendants are past due for the March 30, 2019 payment through February 12, 2020 payment and that there was

due and owing \$63,791.90 on the subject account at the time the first Order of Judgment of Foreclosure and Sale.

Defendants' only defense to an action for Foreclosure would be that the payments required under the Contract have been made and Plaintiff's verified account is in error. Defendants have not and cannot meet this burden. The uncontradicted Affidavit of Plaintiff is that Defendants were more than 11 months in default of payments at the time of the first Order of Judgment of Foreclosure and Sale and Defendants have not made a payment since February 2019, over two years ago. As the foreclosure sale has occurred, Plaintiff asserts that it cannot reinstate the loan, as no loan exists. Defendants' only option at this juncture, if any, would be full payment. The Defendants have failed to offer full repayment and therefore lack a meritorious defense.

Additionally, the relief sought by Defendants would prejudice Plaintiff. As set forth in Plaintiff's uncontradicted affidavit, the account more than 11 months in default of payments at the time of the first Order of Judgment of Foreclosure and Sale and Defendants have not made a payment since February 2019, over two years ago. Furthermore, the property has been sold. The secured collateral is real property, which is subject to depreciation. Plaintiff would be prejudiced by the grant of the Motion for Relief from Default.

Service of Process was done in a manner compliant with S.C.R.C.P. 4 and Defendants cannot meet the facts for relief required by SCRCP 60 (b), therefore the motion is denied.

AND IT IS SO ORDERED

**Electronic signature of Judge Joseph M. Strickland, Master of Equity for Richland Co. to follow**

Columbia, South Carolina

June 16, 2021



Richland Common Pleas

**Case Caption:** First Citizens Bank & Trust Company vs Justin K Spires , defendant,  
et al  
**Case Number:** 2019CP4005698  
**Type:** Master/Order/Other

It is so Ordered

s/Joseph M. Strickland, 3055